In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1508

CHONG YUK WAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of being found in the United States after deportation and without permission of the Attorney General, in violation of 8 U.S.C. 1326. On February 14, 1972, he was given a two years' suspended sentence and was placed on two years' probation. The court of appeals affirmed in a memorandum opinion (Pet. App. 1b-2b).

The stipulated evidence showed that petitioner was born in China and became a naturalized Canadian citizen on March 31, 1952. He was never a citizen of the United States. On January 11, 1962, petitioner was arrested in this country as an alien who had remained in this country without authority; he was deported to Canada on March 12, 1962. Within thirty days after his deportation, petitioner knowingly reentered the United States without having obtained the permission of the Attorney General and thereafter remained in this country. On September 29, 1970, petitioner surrendered himself to the Immigration and Naturalization Service in Boston, Massachusetts.

Prior to trial, petitioner moved to dismiss the indictment on the ground that the prosecution was barred by the statute of limitations. The district court denied the motion. The court of appeals affirmed the conviction, holding that, contrary to petitioner's contention, " '[f]ound' does imply a continuing offense" (Pet. App. 2b).

1. The statute applies to any alien who, having been previously arrested and deported or excluded and deported, commits one of three offenses: (1) illegally enters the United States; (2) attempts to so enter; or (3) "is at any time found in" the United States after his deportation. Petitioner was indicted for the third of these offenses and contends that the statute of limitations commenced to run on the date of his unlawful reentry in 1962 rather than the date his presence became known to the authorities in 1970.

Such an interpretation flouts the plain meaning of the statutory language and in effect repeals the "found in" clause, which was specifically added to the statute by Congress in 1952, by giving it the same meaning as the "enters" clause that was already in the statute.

Petitioner's ingenious arguments regarding the meaning of the word "found" (Pet. 9-12) cannot establish that petitioner was "found" on the date of his reentry, when in fact it is conceded that his reentry and his presence in the United States were unknown to governmental authorities until many years later.[1] And if we accept the petitioner's assertions that "found" refers to "presence," that does not advance his contention that the statute does not describe a continuing offense. Just as *United States* v. *Cores*, 356 U.S. 405, held that "remains" describes an offense that continues until the alien leaves the United States, being either "present" or "found" would similarly describe a continuing offense.

Much of the petitioner's argument rests on the assertion that the statutory word "enters" does not connote a continuing offense, and it is on that basis that he relies on *United States* v. *Cores*, *supra* at 408 n.6, which so stated.[2] We do not dispute this

[1] The statute of limitations is not without meaning as applied to the offense in question; it would presumably begin to run at the time that a deportee's presence in the United States becomes known to the appropriate governmental authority.

[2] The other cases cited in this connection by petitioner, such as *United States* v. *Vasilatos*, 209 F. 2d 195 (C.A. 3), also address themselves to "entry."

contention, but merely point out that the Court's discussion of "entry" is not relevant to the offense with which petitioner was charged, which has been read by at least two courts to entail a continuing offense. *United States* v. *Bruno*, 328 F. Supp. 815, 825 (W.D. Mo.); *United States* v. *Alvarado-Soto*, 120 F. Supp. 848, 850 (S.D. Cal.).

2. The legislative history of this plain language does not aid petitioner. It is true, as petitioner asserts (Pet. 7-9), that at the time of the enactment of 8 U.S.C. 1326 Congress was concerned with previously encountered venue problems in regard to the entry offense. But this is not to suggest that venue was the only concern. A basic aim of the Immigration and Naturalization Service, as set out in its statement to Congress, was also to broaden the coverage of the statute by adopting the "found in" language.[3]

In a similar vein, the Deputy Attorney General advised the Judiciary Committee as follows:

> Section 276 [8 U.S.C. 1326]: This section is designed to replace provisions now found in existing law with respect to criminal offenses which will be committed if a previously deported alien returns to the United States. It adds to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. * * *[4]

---

[3] Analysis by General Counsel, Immigration and Naturalization Service, of S. 3455—81st Cong., 2d Sess., p. 276-2.

[4] Joint Hearings on S. 716, H.R. 2379, and H.R. 2816, Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess., p. 716.

These authoritative commentators obviously recognized that this new offense, by its precise language, "clearly contemplate[d] a prolonged course of conduct." *Toussie* v. *United States*, 397 U.S. 112, 120; see 2 Gordon and Rosenfield, *Immigration Law and Procedure* § 9.25 (1971). There is no suggestion that Congress viewed the matter any differently. Indeed, that this new statute was not enacted simply to allay a venue problem is underscored by the fact that Congress passed another provision (8 U.S.C. 1329) which takes care of the venue problems thought to exist with regard to the "enters" language of the statute.

3. *Toussie* v. *United States*, 397 U.S. 112, also relied upon by petitioner, does not help him. It held that failure to register for the draft, which by presidential proclamation was required to be done within five days of attaining the age of eighteen, was a completed offense after that point for statute of limitations purposes. There is nothing in such a requirement that on its face suggests a continuing offense, and the Court declined to construe a requirement that manifestly was to be performed by a specified date to impose, *sub silentio*, a continuing duty to register, the violation of which would constitute a continuing offense and would toll the statute of limitations. The *Toussie* statute is different on its face from the provision petitioner is charged with violating, which has no fixed chronological referrent, but which continues to be violated by petitioner's continuing unlawful presence in the United States. Unless the plain lan-

guage of the statute is cast aside, the statute of limitations cannot begin to run until a violator is "found in" the United States, which, in this case, occurred in December 1970.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 470834 879